MOTION FILED

MAY 30 1984

No. 83-1267

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MELVIN POWERS, DON NORWOOD, CANDACE WOODLEY AND DEBRA BAILES,

Petitioners,

v.

THE CITY OF HUNTSVILLE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR ALBERTSONS, INC.—SOUTHCO DIVISION IN SUPPORT OF RESPONDENT

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Albertsons, Inc.—Southco Division ("Albertsons") hereby respectfully moves for leave to file the attached brief amicus curiae in this case. The consent of Respondent was obtained. The consent of Petitioners was requested, but not given.

This case involves an issue of whether the jurisdiction of the Alabama state courts over the criminal prosecutions of Petitioners was preempted by the National Labor Relations Act. Petitioners were arrested for criminal trespass in the third degree after they refused to leave

Albertsons' property after being requested to do so. As set forth more fully in the section of Albertsons' brief entitled "Interest of the Amicus Curiae," this case directly affects Albertsons' interest in protecting its private property against the continuing threat of trespassory confrontations from Petitioners.

Respondent, the City of Huntsville, desires to defer argument on the federal labor law preemption issue to Albertsons. It is believed that Albertsons' brief amicus curiae will aid the Court in its consideration of the federal labor law preemption issue in this case.

Respectfully submitted,

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May 30, 1984

INTEREST OF THE AMICUS CURIAE

This brief, submitted on behalf of Albertsons, Inc.—Southco Division (hereinafter "Albertsons") as amicus curiae and joined by the City of Huntsville, Alabama, will address the issue of federal labor law preemption raised in the petition for certiorari. Albertsons urges that the Alabama state courts correctly held that the National Labor Relations Act did not preclude them from exercising subject matter jurisdiction over the criminal prosecutions of the Petitioners Powers, Norwood, Woodley and Bailes.

Petitioners were arrested for criminal trespass in the third degree after they refused to remove themselves, upon request, from the premises of Albertsons' Huntsville store.[1] Petitioners Bailes and Woodley were arrested once, Petitioner Norwood was arrested twice, and Petitioner Powers was arrested three times, all in the same day. All of the arrests occurred on the premises of Albertsons' Huntsville store.

This case thus directly affects Albertsons' interests in maintaining the integrity of its private property. Moreover, if the criminal convictions are set aside, or if the State is preempted from enforcing its criminal trespass laws, Albertsons believes that it would face a continuing threat of trespassory confrontations from Petitioners, who have clearly demonstrated their intent to disrupt Albertsons' business, if given the opportunity.

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[1] Section 13A-7-4 of the Alabama Criminal Code provides as follows:

> A person is guilty of criminal trespass in the third degree when he knowingly enters or remains unlawfully in or upon premises.

STATEMENT OF THE CASE

The four Petitioners entered the Albertsons store in Huntsville, Alabama on November 24, 1981. (Tr. 61)[2] Two of the Petitioners, Bailes and Woodley, had recently been discharged as employees of that store. Bailes and Woodley were discharged for violations of store policy, and for threatening other employees with physical violence and reprisals during their union organizing activities. At the time of their dismissal, Bailes and Woodley were advised that they would not be permitted to return to the store for any reason, in light of the circumstances which necessitated their discharge. (Tr. 61) As a result, when Bailes and Woodley entered the store, Albertsons' management informed the two former employees that they were not allowed to remain on the premises and requested them to leave immediately. (Tr. 61) Bailes and Woodley refused. At this point, Petitioners Powers and Norwood interceded on behalf of the two former employees, declaring the group's intention to remain on Albertsons' premises. (Tr. 62) Until this time, Albertsons had no idea of the identity of Powers and Norwood, or that they were associated with Bailes and Woodley. (Tr. 63) Petitioners Bailes and Woodley, along with Petitioners Powers and Norwood, proceeded to the "deli" area of the store and sat at a customer table. In response, Albertsons called the police. (Tr. 64)

Several City of Huntsville police officers responded to the call. In their presence, Albertsons' Store Manager George Malmberg repeated his request that the group leave the premises. After Malmberg's request was refused, the police themselves directed Petitioners to leave

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[2] References to the Official Transcript of the Huntsville Municipal Court proceeding are hereinafter referred to as (Tr.).

the premises or face criminal charges. (Tr. 21, 24) Despite these warnings, Petitioners refused to leave, and Petitioner Powers objected in a loud tone of voice. (Tr. 21, 70) Petitioner Powers was then arrested for criminal trespass and led from the store. (Tr. 24) The other Petitioners were not arrested, because at this time they agreed to leave voluntarily. (Tr. 24, 25) However, as the three individuals departed, they shouted and created a major disruption in the store. (Tr. 33, 72)

Later that afternoon, the same four individuals returned to the store. Again, Albertsons directed Petitioners to leave the premises, but they refused. The police were called, and after the police made several requests for the group to depart, all four Petitioners were arrested for criminal trespass. (Tr. 39-42) The same disruptive scene was repeated for a third time later that evening, and again resulted in the arrest of Petitioners Powers and Norwood. (Tr. 53, 57)

Albertsons' initial request to leave the premises was directed only at the discharged employees, Bailes and Woodley, who had previously been informed that they would not be allowed back in the store. Subsequent requests were directed toward all four Petitioners after the first confrontation demonstrated that all of the Petitioners—including Powers and Norwood—were intent upon disruptive activity. (Tr. 33, 39, 40, 85) In none of their several visits did Petitioners attempt to speak with other employees, disseminate union-oriented literature, or attempt to initiate any union organizational activity during the course of their trespass. (Tr. 21, 25)

On December 2, 1981, while Petitioners were awaiting trial on criminal trepass charges, the Retail Clerks Union, Local 1557 (the "Union") filed unfair labor practice charges against Albertsons with the National Labor Rel-

tions Board (the "NLRB") alleging, *inter alia*, violations stemming from the arrests of Petitioners. These charges involve a large number of issues, all but one of which are unrelated to the instant criminal proceeding. Pursuant to these charges, the NLRB's General Counsel issued an unfair labor practice complaint against Albertsons. A formal hearing on these charges was held before an administrative law judge, who ruled that Albertsons did not violate the National Labor Relations Act by causing the arrests of the Petitioners. The Union has filed exceptions to these findings, and final resolution of these allegations is pending before the NLRB.

On December 28, 1981, Petitioners were convicted of criminal trespass in the third degree in Huntsville Municipal Court, and fined $25.00 each plus costs. (Tr. 106) Petitioners then exercised their right to trial *de novo* in the Circuit Court of Madison County. The Circuit Court also entered the convictions and imposed $25.00 fines on all four Petitioners. Both the Municipal Court and the Circuit Court rejected Petitioners' defense that, under the federal labor law preemption doctrine, Alabama local and State courts did not have subject matter jurisdiction to hear or decide the dispute. Petitioners appealed their convictions to the Court of Criminal Appeals of Alabama which affirmed the convictions and rejected Petitioners' federal preemption arguments. Petitioners' subsequent petition for a writ of certiorari was denied by the Alabama Supreme Court. This petition followed.

ARGUMENT

The Present Case Falls Squarely Within Established United States Supreme Court Guidelines For Application Of The Federal Labor Law Preemption Doctrine

Petitioners argue that the federal labor law preemption doctrine automatically prohibited Alabama state courts

from exercising jurisdiction over the events which led to the arrests of Petitioners. They assert that the State was without power to enforce its criminal trespass laws, and that the matter should have been referred to the NLRB, because the arrests of Petitioners arose in the context of a labor relations dispute. However, the petition should be denied because existing decisions of this Court establish the guidelines for state courts to determine whether their jurisdiction is preempted by federal labor law, and the facts of the present case do not present any novel issue which was not resolved within those guidelines.

Under the doctrine enunciated in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), state courts are preempted from exercising civil jurisdiction over disputes where the challenged action is either "arguably protected" or "arguably prohibited" by the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, as amended (the "Act"). *Garmon* held that, under certain circumstances, state courts should refer, to the special competence of the NLRB, consideration of actions challenging arguably protected or arguably prohibited conduct. However, *Garmon* noted that certain state interests are "so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction," preemption should not be inferred. 359 U.S. at 244. One of these state interests is the enforcement of state and local criminal laws governing trespass and other acts that breach the peace.

In *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), a union had engaged in picketing on the employer's privately-owned walkways and parking lot. When the employer requested the pickets to leave the premises, they refused, stating they would remain until forced to leave by legal action.

The employer then obtained a state court injunction against the picketing. On appeal, the California State Supreme Court reversed the injunction order, stating that, under the *Garmon* doctrine, the state court was preempted from retaining jurisdiction over the trespassory activity. This Court reversed, holding that the mere fact that the union's trespass was "arguably protected" under the Act was insufficient to deprive the state court of jurisdiction. The *Sears* holding rests upon the observation that the *Garmon* doctrine should not be applied mechanically, but rather that preemption should occur only after the state court has weighed the interests affected and assessed the danger of federal-state conflict. Specifically, application of the preemption doctrine depends upon the following factors: 1) the employer's ability to obtain NLRB review of the union's challenged conduct, or, at least, reasonably induce the trespassing party to seek such relief; 2) the state's interest in enforcing its laws; and 3) the likelihood that the trespassory conduct is properly classified as "protected" conduct under the Act. *Id.* at 200-04.

In *Sears*, the employer had no opportunity to obtain NLRB review of the challenged conduct, and could not induce the union to seek NLRB review. As a result, the employer was faced with three options: first, it could allow the trespass to continue; second, it could resort to self-help by forcibly removing the pickets; or third, it could assert its rights under the state trespass laws. The *Sears* opinion acknowledged that acquiescence and self-help were unacceptable and could be legitimately rejected. Thus, the employer was left with no real choice but to invoke the state trespass laws. This Court further emphasized that

> permitting state courts to evaluate the merits of an argument that certain trespassory activity is pro-

> tected does not create an unacceptable risk of interference with conduct which the Board . . . would find protected.

Id. at 205. Significantly, it was observed that the risk of state interference with federal labor policy was minimal, because criminal trespass is *rarely*, if ever, protected activity under the Act. *Id.; see also NLRB* v. *Babcock & Wilcox*, 351 U.S. 105 (1956). Thus, the state's interest in enforcing its trespass laws and the unlikelihood of interference with the federal statutory scheme tipped the balance decidedly against preemption.

The present case involves nothing more than a routine application of the criteria this Court has established to guide state courts in determining the scope of the federal preemption doctrine. Analysis of the facts of the instant case according to the *Garmon-Sears* framework clearly indicates that the Alabama state courts were not preempted from deciding the merits of Petitioners' prosecutions. Initially, the State acted properly in exercising its police power to keep the peace. Moreover, Albertsons was fully justified in asking the discharged employees and their companions to leave the premises. Albertsons has the right to regulate the use of its private property,[3] and properly did so, by revoking its invitation to Petitioners. Albertsons' decision to request Petitioners to leave was particularly understandable given the fact that Petitioners' initial and subsequent visits to the store were obviously intended to disrupt business and provoke a confrontation.

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[3] In Central Hardware Co. v. NLRB, 407 U.S. 539 (1972), this Court rejected flatly the notion that a store-owner's invitation to the public somehow strips the property of its private character. Thus, Albertsons has the right to control access to its premises.

When Petitioners refused to depart, the State and Albertsons were presented with the same three options discussed in *Sears:* (1) acquiescence to the disruptive, trespassory conduct; (2) self-help by Albertsons in the form of a forceful eviction; or (3) assertion of the state trespass laws. Neither the State nor Albertsons had a realistic opportunity to seek NLRB review of the trespassory conduct. The trespasses were immediate, local and disruptive. There was hardly time to seek intervention of a distant federal agency that lacks police power. Moreover, Petitioners' actions did not appear to be subject to the prohibitions of the Act. Albertsons also was not in a position to induce Petitioners or the Union to place the validity of their actions before the NLRB.[4] Petitioners, on the other hand, could have sought NLRB review of their rights in this dispute by complying with Albertsons' request to leave the premises and then filing an unfair labor practice charge. Petitioners ignored this opportunity and instead provoked the arrests. Indeed, Petitioners waited over a week even to file a charge with the NLRB.

Albertsons' assertion of its rights under the trespass law was entirely justified and did not infringe upon any arguably protected conduct. In order to label their actions "arguably protected conduct," Petitioners isolate a single statement contained in the opinion of the Alabama Court of Criminal Appeals indicating that "all parties knew the people were present in the delicatessen section

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[4] In fact, the testimony adduced in the Municipal Court proceeding overwhelmingly demonstrated that Petitioners were not attempting to exercise their rights under the Act, but were merely engaged in provocative, illegal conduct. Under those circumstances, Albertsons had no reason to believe that the NLRB would be an appropriate forum for resolution of the trespass problem.

of Albertson's store in connection with efforts to organize the employees." (Pet. App. at 44a.) This statement, however, is merely an observation that, at some point during the day of the multiple arrests, it became obvious that Petitioners' repetitious, provocative conduct arose out of the organizational campaign at Albertsons' Huntsville store. But it is unchallenged that Petitioners did not engage in *any* form of solicitation, distribution, picketing, or other protected, concerted activity at any time while in the store. Nothing in the record suggests otherwise. Indeed, after a formal hearing on the merits of the unfair labor charges, the NLRB's administrative law judge specifically found that the four Petitioners were not in the store in order to engage in organizational activity. He also ruled that Petitioners were not asked to leave because of any union organizing activity or because of their union affiliation. Rather, on the occasion of the first trespass, Petitioners Bailes and Woodley were asked to leave because of the reasons which necessitated their discharge. The other Petitioners were included in the request only after they demonstrated an intent to disrupt store business. Albertsons' subsequent decision to prevent the group from returning after the first arrest was motivated by disruptions caused by Petitioners during the first confrontation, and had nothing whatsoever to do with Petitioners' union affiliation. *Albertsons, Inc.—Southco Division* v. *Retail Clerks Local Union 1557*, Case No. 10-CA-17793 (November 25, 1983) (administrative law judge's decision). Thus, the facts which formed the basis for Petitioners' prosecutions for criminal trespass were completely unrelated to any activity arguably protected by the Act. Because the *Garmon* preemption doctrine does not apply unless the challenged activity was either arguably prohibited or arguably protected, the Alabama state courts properly concluded that federal preemption of these prosecutions was entirely inappropriate.

Assuming *arguendo*, however, that Petitioners' conduct was somehow related to the exercise of statutory rights, it is highly unlikely that the conduct would be found to be protected under the Act. Indeed, the *Sears* opinion emphasized that trespassory organizational activity is ordinarily not protected by the provisions of the Act:

> *[P]ermitting state courts to evaluate the merits of an argument that certain trespassory activity is protected does not create an unacceptable risk of interference with conduct which the Board, and a court reviewing the Board's decision, would find protected.* For while there are unquestionably examples of trespassory union activity in which the question whether it is protected is fairly debatable, *experience under the Act teaches that such situations are rare and that a trespass is far more likely to be unprotected than protected.*
>
> Experience with trespassory organizational solicitation by nonemployees is instructive in this regard. While *Babcock* indicates that an employer may not always bar nonemployee union organizers from his property, his right to do so remains the general rule.

436 U.S. at 205 *(emphasis added). See also Babcock & Wilcox, supra.* Indeed, the criminal element of the violations and the aggravated nature of the trespassory activity in this case—Petitioners' insistence that they have the absolute right to remain in the *interior* of the Albertsons' store[5]—suggest an even stronger argument than in *Sears*

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[5] It is important to note that the Union still has available traditional, non-trespassory means for pursuing its organizational campaign. Albertsons does not seek to interfere with these rights; its sole concern is the vindication of its private property rights. The intrusive nature of the Union's claim herein is even greater than that asserted in *Sears*. In *Sears*, the Union sought access to an *exterior* portion of private property. In the instant case, the Union seeks entrance to the *interior* of the premises.

against the view that Petitioners' conduct was arguably protected. Furthermore, as stated previously, an administrative law judge has already ruled that Petitioners' conduct was not protected under the Act. Because it is unlikely that Petitioners' trespassory conduct would ever be held to be protected, there is little risk of state court interference with the federal labor scheme. Accordingly, Petitioners' preemption defense was properly rejected by the state courts.

The Pendency Of Unfair Labor Practice Charges Before The NLRB Against Albertsons Should Not Require Preemption Of These Criminal Prosecutions

Petitioners also cite *Sears* for the proposition that the pendency before the NLRB of an unfair labor practice charge against Albertsons required preemption of the state court prosecutions. Such a rule would allow any criminal defendant to evade prosecution simply by filing an unfair labor practice charge with the NLRB. Not only does this notion lack support in the *Sears* opinion, but also it presents a totally unworkable rule for applying the federal labor law preemption doctrine, as demonstrated by the facts of the present case.

First and foremost, the NLRB possesses the authority to enjoin a state court proceeding which interferes with the agency's enforcement of the Act. *See NLRB* v. *Nash-Finch Co.*, 404 U.S. 138 (1971). Thus, if the NLRB perceived the state criminal proceedings to be inconsistent with its statutory authority, the NLRB could have sought appropriate injunctive relief in a federal district court. Moreover, the Act empowers the NLRB, upon issuance of a complaint, to seek temporary relief under Section 10(j) in situations where the violations are clear and flagrant, and where immediate relief is necessary. The availability of these powers more than adequately

protects against State intrusion into federally protected areas.[6] Despite a request by the Union herein, the NLRB refused to pursue either course of action, indicating that it does not view the instant proceedings as disruptive of the federal statutory scheme. Indeed, the contrary appears. The administrative law judge has already held that Petitioners' conduct was not protected under the Act. Moreover, *Sears* and *Babcock & Wilcox* strongly indicate that the trespassory conduct involved herein—which at best is only marginally related to the exercise of statutory rights—will ultimately be found by the NLRB to be unprotected.

Furthermore, referral to the lengthy NLRB process—which in the present controversy has already spanned more than two years since the Union filed its complaint—would significantly and unfairly impact upon the State's ability to enforce its criminal laws and upon the rights of Albertsons. In the period between preemption of state remedies and a final NLRB decision, the State would be powerless to enforce its laws, and Albertsons would be unable to prevent Petitioners from continuing their disruptive assault on its business without the unattractive

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[6] A determination by the General Counsel's office to issue a complaint cannot by itself be considered a legal conclusion that Petitioners' activity was arguably protected. The General Counsel's action represents only a tentative decision by the prosecutorial arm of the NLRB. Until such time as the NLRB ultimately decides the issue, the General Counsel's preliminary conclusion does not constitute an agency determination. Several state courts have held that preemption of state trespass prosecutions would be proper only if and when the NLRB finally determined on the merits that the challenged conduct was protected activity. *See, e.g.*, Florida Gulf Coast Building Trades Council v. DeBartolo, 392 So.2d 916 (Fla. Dist. Ct. App. 1980); Wiggins & Co. v. Retail Clerks, Local 1557, 595 S.W.2d 802 (Tenn. 1980).

and dangerous use of self-help, which would risk inflaming a potentially explosive situation. Rejection of Petitioners' arguments, on the other hand, would allow the parties to reach a swift resoluton of this controversy in the state courts.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

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